Special Touch Home Care Services, Inc. *and* 1199 Service Employees International Union, Healthcare Workers East.[1] Case 29–CA–26661

April 18, 2007

SUPPLEMENTAL ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

On November 23, 2005, the Respondent filed timely exceptions to Administrative Law Judge Raymond P. Green's September 15, 2005 decision, and a supporting brief. A procedural issue has arisen with respect to the filings.

The Respondent's exceptions document was 92 pages long and the brief was 50 pages long.[2] On December 22, 2005, the General Counsel filed a motion to strike the exceptions and brief, asserting that the exceptions document contained argument that should have been included in the accompanying brief, in contravention of Rule 102.46(b), and that the exceptions, together with the brief, far exceeded the 75-page limit set by the Board. The Associate Executive Secretary granted the motion on July 6, 2006,[3] but gave the Respondent leave to file documents that conformed to the Board's Rules. The order explained the nonconformity with the rules in some detail and cited instructive cases.[4] Thereafter, on July 17, the Respondent filed a revised 38-page exceptions document and a revised 73-page supporting brief. On August 1, the General Counsel filed the Motion to Strike Respondent's Exceptions, with attachments, on which we now rule.

The Board has delegated its authority in this proceeding to a three-member panel. For the reasons set forth below, the Board has decided to accept the Respondent's exceptions and to reject its brief. Accordingly, the General Counsel's motion to strike the exceptions is denied.

[1] The Charging Party officially changed its name from 1199, New York's Health and Human Service Union 1199/SEIU, AFL–CIO, CLC in November 2005.

[2] Pursuant to the Board's Rules and Regulations, Sec. 102.46(j), the Respondent had previously requested permission from the Board to file a brief in excess of 50 pages. On November 15, 2005, the Associate Executive Secretary granted permission but limited the brief to 75 pages.

[3] Hereafter, all dates refer to 2006.

[4] *Hotel Del Coronado*, 344 NLRB No. 35 (2005), and *Geske & Sons, Inc.*, 317 NLRB 28 (1995), enfd. 103 F.3d 1366 (7th Cir. 1997).

DISCUSSION

Section 102.46(b)(1) of the Board's Rules and Regulations states:

> Each exception (1) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. *If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matter shall be set forth only in the brief*. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in section 102.46(j). [Emphasis added.]

Section 102.46(j) states in pertinent part:

> *Any brief filed pursuant to this section shall not be combined with any other brief*, and except for reply briefs whose length is governed by paragraph (h) of this section, shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion. . . . [Emphasis added.]

Elucidating these rules, the Board held in *Hotel del Coronado*, supra, slip op. at 1, that when a party opts to file exceptions and a brief, all argument should be confined to the brief. The Board defined argument as "the reasoning or facts that assertedly establish the exception." Id. The Board also advised that it may nevertheless accept exceptions that contain argument if the number of pages of argument in the exceptions, combined with the number of pages of the brief, does not cause the brief to total more than the page limit set by the Board.

Further, in *Geske & Sons, Inc*., supra, at 29, the Board stressed that "a person should not expect in the future, or consider as now the norm, that the party filing exceptions will be afforded several opportunities to put its exceptions in proper form in conformity with the filing requirements of the Board's Rules." As noted above, *Hotel del Coronado* and *Geske & Sons* were cited in the July 6 order.

Notwithstanding the order, the Respondent filed revised exceptions that include argument and separately

filed a supporting brief. For example, exceptions 2(a)-(e), 3(a)-(c), and 5(a)-(f) contain substantial factual argument concerning the nature of the Respondent's operations, the characteristics of the patients it serves, and the training and qualifications of the employees in issue. Exceptions 21, 22, 26, and 31 and their subsections similarly are infused with factual arguments about particular employees' acts and omissions, patients' conditions, and the Respondent's conduct. Further, exception 87 and its subsections contain factual and legal argument as well as cases not cited by the judge. Accordingly, the exceptions document continues to contain numerous pages of argument which, when added to the 73 pages of text of the brief, clearly exceed the extended page limit for the brief established by the Associate Executive Secretary. Thus, the Respondent's revised submission is noncompliant both with the requirements of the applicable rules in form (submit either one combined document or two separate documents), and with the page limitation.

We find that the Respondent's overall submission is nonconforming and might justify granting the General Counsel's motion.[5] The July 6 order advised the Respondent's counsel that the original exceptions and brief submitted by him were noncompliant, informed him generally what the defect was, and provided him with rule and case citations for guidance. Despite this, counsel submitted another noncompliant document. Striking the defective exceptions, however, may impair the Respondent's right under Section 10(e) of the Act to appeal.[6] Under the present circumstances, we believe it strikes a fairer balance to deny the motion to strike the exceptions and instead strike the brief. Thus, our ruling on the motion serves to uphold the Board's rules without unduly penalizing the Respondent. Moreover, we do not think that the Respondent will be unfairly prejudiced by our rejection of the brief that was filed on its behalf, given the substantial amount of factual and legal argument contained in the exceptions, which will be considered in our review.

Our colleague observes that under Rule 102.46(b)(1), the Respondent's exceptions must "concisely state the grounds" for each exception but also omit "argument." We agree. He says these requirements, taken together, place excepting parties in a "dilemma," which the Respondent has made "a good faith and successful effort to resolve." We disagree. If, as is repeatedly the case here, a respondent wishes to except to a judge's omission of factual findings concerning a given individual, a concise statement of the grounds for that exception might be that the judge's decision "ignores record evidence and omits relevant facts concerning [name]." Argument in support of that exception, in the respondent's brief, would then particularize the omitted facts. *Hotel del Coronado*, supra (defining "argument" as "the reasoning *or facts* that assertedly establish the exception") (emphasis added). The difference between "grounds" and "argument" is plain; the Respondent repeatedly disregards it. Our colleague maintains that even if our suggested format for a concise statement of grounds is adequate, that does not mean that the Respondent's chosen format is improper. But we do not think that position squares with *Hotel del Coronado*'s definition of "argument," under which, as explained above, the Respondent's exceptions fail to conform to Section 102.46(b)(1).

As to the deficiency of particular exceptions, our colleague does not so much take issue with the *fact* of those deficiencies as he does with their scope and extent.[7] The exceptions we cite as problematic are merely representative examples of the Respondent's extensive noncompliance with the Board's rules governing the filing of exceptions and briefs. We concede that there is room for honest disagreement about the degree of noncompliance from exception to exception and page to page of the Respondent's submissions. Nonetheless, the Respondent's noncompliance with the rules and allowable page limitations governing the filing of exceptions and briefs remains a fact, even though the Board accorded the Respondent a second opportunity to submit documents that comply with the rules and provided instruction as to how it could comply. Some sanction is, therefore, warranted.

In view of the foregoing, the General Counsel and the Charging Party may file answering briefs and cross-exceptions no later than 14 days from the date of this Supplemental Order.

[5] We recognize that the motion before us requests that the Board strike the Respondent's exceptions, rather than the entire submission. The Board, however, may strike sua sponte documents filed that are nonconforming with its rules.

[6] Sec. 10(e) provides in pertinent part, "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[7] Our colleague acknowledges that the Respondent's exceptions and brief are nonconforming in some respects. The exceptions contain "isolated" phrases totaling, in his estimation, "at most three pages that might reasonably be viewed as argument." As shown, we do not agree with this estimate. He also acknowledges that the exceptions quote from and assess testimony, although not "extensively," and that they contain "some citations to decisional precedent." These are precisely the types of nonconformities that the Board found unacceptable in *Hotel Del Coronado* and *Geske and Sons*, supra.

Dated, Washington, D.C. April 18, 2007

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

I do not agree with my colleagues that the Respondent's exceptions are improper.

The Board's rules prohibit the inclusion of argument in exceptions where the excepting party files a brief in support of exceptions. Board's Rules and Regulations, Section 104.46(b)(1). However, Section 102.46(b)(1) also requires that the excepting party "set forth specifically" each exception, "identify" each challenged part of the judge's decision, and "concisely state the grounds" for each exception. Id. The rule is not a model of clarity. On the one hand, the party must not "argue" in its exceptions. On the other hand, the party must set forth, in the exceptions, the concise "grounds" for the exception. Thus, the party must not include too little because that could be an insufficient articulation of "grounds", and the party must not include too much because that could constitute an argument. In my view, the Respondent here made a good faith and successful effort to resolve the dilemma.

Applying these considerations here, I initially note that the General Counsel's motion to strike the Respondent's exceptions does not specifically identify any of the language that the General Counsel contends is argument. In addition, a review of the exceptions discloses little, if any, language that is clearly argument. On the contrary, the exceptions contain only isolated phrases or passages, totaling at most three pages, that might reasonably be viewed as argument. Further, although the exceptions describe evidence or testimony as "undisputed", the exceptions do not quote from or assess testimony. Although the exceptions do contain some citations to decisional precedent, these citations are limited in number and the exceptions do not analyze that precedent.

The majority claims that eight exceptions—2, 3, 5, 21, 22, 26, 31, and 87—contain argument. I disagree. All but exception 87 challenge the judge's failure to find and give weight to specific alleged facts. These facts, if found, would be relevant to the argument set forth in the brief. In my view, these exceptions constitute a good-faith effort by the Respondent to comply with the Board's rules requiring the party to "set forth specifically" the exception and "concisely state the grounds" for each exception.

The majority next suggests that the Respondent should have used a more truncated format when stating its exceptions. More particularly, the majority suggests that, rather than using a format that stated the facts which the judge failed to find regarding a particular employee, the Respondent should have used a format that merely stated that "the judge's decision 'ignores record evidence and omits relevant facts concerning [name].'" However, because the format suggested by the majority provides little information regarding the exceptions, such exceptions would arguably lack the specificity required by the Board's rules. Further, even assuming arguendo that my colleagues' format is adequate and perhaps better than the one chosen by the Respondent, that does not mean that the Respondent's choice violated the Board's requirement by using a format that provided greater specificity.[1]

Exception 87, likewise, does not violate the Board's rules. Subpart (a) merely challenges one of the judge's specific affirmative findings. The challenge is specific and is concisely stated. With regard to the remaining three subparts, they total less than 14 lines of text and it is not clear that they are argument. Subparts (b) and (d) challenge the judge's failure to make concluding factual findings. They simply reference other exceptions listing the specific alleged facts supporting the Respondent's position. Subparts (b) and (d) are thus somewhat repetitive of other exceptions, but that does not render them argument. Subpart (c) excepts to the judge's failure to distinguish three Board decisions, one of which was cited by the judge as an example. Exception 87(c) does not analyze the decisions at length but concisely states the allegedly distinguishing facts in one sentence.

Under these facts, and viewing the exceptions as a whole, I find that the General Counsel has failed to prove that the Respondent's exceptions were deficient under

[1] In *Hotel Del Coronado*, 344 NLRB No. 35 (2005), the Board stated that the "vast majority of the Respondent's exceptions contain arguments, i.e., the reasoning or facts that assertedly establish the exception." The majority suggests that the Board thereby held that all "reasoning or facts" are "argument." However, it would be difficult, if not impossible, to set forth the "grounds" for the exception without including at least some reasoning or facts. Rather, the Board in *Hotel Del Coronado* gave examples of the "reasoning or facts" that are "argument"—i.e., "quot[ing] or paraphras[ing] specific testimony and exhibits" or the "assessment of the testimony cited, including statements that some testimony is 'more credible,' there is 'no contrary evidence,' or the judge held the Respondent to a 'higher standard,' engaged in 'pure speculation' or attempted to 'mislead the Board.'" In the instant case, the Respondent's exceptions state that certain evidence is "undisputed" but do not contain other material falling within these examples of "argument."

the Board's rules.[2] Accordingly, I would accept the Respondent's exceptions. Further, inasmuch as there was no violation of the Board Rule, I would not impose any sanctions.[3]

Dated, Washington, D.C. April 18, 2007

Robert J. Battista, Chairman

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] Contrary to the majority's implicit suggestion, I do disagree with the asserted "fact of those deficiencies". To repeat the obvious, I conclude that the Respondent's exceptions are not deficient.

[3] My colleagues reach the anomalous conclusion that the sanction for improper *exceptions* is to strike the *brief.* My colleagues seek to explain their reluctance to strike the exceptions. They say that "striking the defective exceptions... may impair the Respondent's right under Section 10(e) of the Act to appeal." Indeed, striking the exceptions *would* preclude the Respondent from arguing the underlying merits before the court. See Section 10(e). The Respondent could only argue to the court that the exceptions were not *properly* stricken. Although my colleagues find that the exceptions herein are defective, they are unwilling to take the step of striking them.

In any event, *no* party asks for the sanction imposed by my colleagues. My conclusion that the exceptions do not violate the Rule makes it unnecessary for me to reach the issue of whether this would be an appropriate sanction for a violation of the Rule.